88-199

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DEBORAH BELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. Whether the district court abused its discretion by refusing to grant petitioner's motion for a new trial based upon newly discovered evidence; where the evidence in support of the motion is the putative testimony contained in an affidavit sworn by a co-defendant which exculpates petitioner from the crimes for which she was convicted.

PARTIES TO THE PROCEEDING BELOW

On April 7, 1982, the United States filed indictments against Petitioner, Deborah Bell ("Bell"), and Co-Defendants, Robert Tucker ("Tucker") and Michael Ball ("Ball") in the United States District Court for the Northern District of Illinois. These parties were prosecuted together in the district court on charges of mail fraud and violations of the federal banking code.

Each defendant was convicted, sentenced and incarcerated for periods of time.

The United States Court of Appeals for the Seventh Circuit affirmed the convictions, United States v. Tucker, 773 F.2d 136 (7th Cir. 1985), and certiorari was denied by this Court to both Bell and Tucker.

On September 3, 1986, Bell and Tucker filed motions for new trials based upon newly discovered evidence. These motions were denied by the district court and the court of appeals affirmed. Both Bell and Tucker filed timely Petitions for Rehearing which were denied by the court of appeals.

Deborah Bell files this Petition For Writ of Certiorari seeking review by the United States Supreme Court of the denial of her motion for a new trial.

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PETITION FOR A WRIT OF CERTIORARI TO
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CITATION TO THE OPINION OF THE COURT BELOW

Petitioner was convicted on charges of wire fraud, 18 U.S.C. §1343, and submitting false statements to a federally insured bank, 18 U.S.C. §1014. The United States Court of Appeals For The Seventh Circuit affirmed this conviction. United States v. Tucker, 774 F.2d 136 (7th Cir. 1985), cert. denied, ____U.S.___, 106 S.Ct. 3337 (1986).

Petitioner filed a motion for a new trial based on newly discovered evidence pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The district court denied this motion on January 2, 1987. The United States Court of Appeals For The Seventh Circuit affirmed the district court's decision, United States v. Tucker, No. 87-1050 and 87-1324, and Petitioner's timely filed Petiton For Rehearing was denied, February 29, 1988.

JURISDICTION

The decision of the court of appeals affirming the denial of Petitioner's Motion for New Trial was rendered January 6, 1988. A Petition For Rehearing was timely filed and denied on February 29, 1988. This Petition For Writ of Certiorari is not filed within the sixty day time period prescribed

under Rule 20(1) of the Rules of The Supreme Court of The United States.

A Petition For Writ of Certiorari in a criminal case may be filed beyond the time prescribed in Supreme Court Rule 20(1). The time limit set forth in this rule is not jurisdictional in a criminal case and thus does not bar this Court's acceptance of this Petition For Writ of Certiorari. This Court may waive the application of the rule. See, Sanabria v. United States, 437 U.S. 54, 57 L.Ed.2d 43, 98 S.Ct. 2170 (1978); Taglianetti v. United States, 394 U.S. 316, 22 L.Ed.2d 302, 89 S.Ct. 1099 (1969).

Petitioner Deborah Bell respectfully suggests that waiver of the time limitations set forth in Supreme Court Rule 20(1) is proper under the circumstances of this case.

Immediately prior to the expiration of the prescribed sixty day period set forth in Supreme Court Rule 20(1), petitioner requested counsel to represent a Petition for Writ of Certiorari on her behalf. Although counsel promptly requested an extension of time to file the Petition For Writ of Certiorari, that request was filed beyond the prescribed period set forth in the rules. Counsel requested the extension of time because it would have been impossible to prepare and timely file the Petition For Writ of Certiorari in view of the volume and complexity of materials presented to counsel for review and the impending deadline for presentation of the Petition for Writ of Certiorari.

Waiver of the sixty day time period set forth in Supreme Court Rule 20(1) is appropriate in this case since the case

involves a serious evidentiary question which should be determined on the merits.

This Petition represents Deborah Bell's last and only opportunity to present facts in her defense of the charges pressed against her. The available new evidence is of such significant weight and credibility that a new trial should result in her acquittal.

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTE OR RULE INVOLVED

This Petition seeks review of the correctness of the district court's denial of petitioner's motion for new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, Fed. R. Crim. P33, which provides as follows:

> The court on motion of a defendant may grant a new trial to

> that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

STATEMENT OF THE CASE

Nature of the Case

Petitioner Deborah Bell ("Bell"), seeks a new trial from her convictions for violations of the wire fraud statute and submitting false statements to a federally insured bank under 18 U.S.C. §§1343 and 1014, respectively.

On April 7, 1982, an indictment was filed charging Robert L. Tucker ("Tucker"), Deborah Bell ("Bell") and Michael Ball ("Ball") with nine counts of wire fraud and one count of submitting false statements to a federally insured bank in violation of 18 U.S.C §1343 and 1014. The jury found all three defendants guilty on all counts, and defendants' post-trial motions were denied. Defendant Bell was sentenced to two years incarceration, and the other defendants received comparable sentences.

A timely appeal was filed in the court of appeals. On September 6, 1985, that court affirmed the convictions as to all defendants in a written opinion authored by Judge Posner, in which Judges Coffey and

Campbell concurred. United States v. Tucker, 773 F.2d 136 (7th Cir. 1985), cert. denied, ____ U.S. ____, 106 S. Ct. 3337 (1986).

After the case was remanded to the district court, Bell first obtained the putative testimony of co-defendant Michael Ball. On September 3, 1986, Bell filed a Motion for New Trial based upon the newly discovered evidence. That motion was denied on December 31, 1986, and a timely appeal was perfected. On January 6, 1988, the court of appeals affirmed the decision of the district court, and Bell's timely petition for rehearing was denied on February 29, 1988.

Statement of Facts

On April 7, 1982, an indictment was filed in the Northern District of Illinois, charging defendants Robert Tucker, Deborah

Bell and Michael Ball with nine counts of wire fraud and one count of submitting false statements to a federally insured bank. (18 U.S.C. §1343 and 18 U.S.C. §1014, respectively). In substance, the indictment charged that Tucker, Bell and Ball knowingly participated in a scheme to defraud the Continental Illinois National Bank and Trust Company of Chicago ("CINB") by submitting false documents to draw down a letter of credit in connection with the purchase of 6,000 metric tons of turtle black beans by Instituto Nacional de Comercializacion Agricola ("INDECA"), a quasi-national Guatemalan purchasing agency.

Bell, a commodities broker in Chicago, had contracted through Thomas Lipani, an American commodities broker located in Guatemala City, to furnish beans to INDECA.

Bell was a principal of Ruthex International, Inc., a Chicago-based commodities company. Bell contacted Irving Pheterson, a Miami commodities broker with contacts in the Far East.

Pheterson, a principal of International Association of Grocers ("IAG") was to assist in supplying the beans to INDECA. Pheterson hired Ball, a Miami freight forwarder, to assist in the preparation of documents. Bell retained Robert Tucker, a well known and respected trial lawyer in Chicago, to serve as her attorney in this transaction.

The contract provided that INDECA would pay for the beans through a letter of credit confirmed by CINB. Upon receipt of documents which falsely represented that IAG controlled or owned the specified beans and that these had been loaded on board a ship

destined for Guatemala, CINB released the proceeds from the letter of credit to Ru Mex. The bulk of these proceeds was paid over to Pantex, Pheterson's alleged supplier in Hong Kong, on the basis of forged documents presented by Pantex. INDECA neither received the beans nor recovered the bulk of the proceeds of the letter of credit.

The government's theory of the case was that defendants knowingly participated in the presentation of false documents to CINB but were, in turn, victims of a fraud perpetrated by Pantex. The government's key witness was Irving Pheterson, whose false representation of ownership of the beans was at the center of the fraud. As the court of appeals acknowledged, Pheterson's testimony was suspect because he testified under

immunity, he had given several inconsistent versions of his story prior to obtaining immunity, and he had suffered brain damage, which made him subject to mental disorders. Defendants made numerous unsuccessful efforts to exclude Pheterson's testimony or to obtain a hearing on its admissability. The defendants' theory of the case was that they had been unaware that the statements presented to CINB were false and that Pheterson, IAG and Pantex, whether separately or together, were the sole architects of the fraud.

None of the defendants, testified at trial. Contrary to the district court's statements (Appendix C), however, both Tucker and Bell made motions for severance during the course of proceedings. Tucker

and Bell unsuccessfully appealed their convictions. United States v. Tucker, 773 F.2d 136 (7th Cir. 1985), cert. denied, ____ U.S. _____, 106 S. Ct. 3337 (1986).

Deborah Bell obtained the affidavit of Michael Ball on August 27, 1986, in which Ball made sworn statements which exculpated Bell and established the absence of her knowledge or participation in the preparation of the fraudulent documents at the time the fraud was perpetrated. (Appendix B).

The affidavit divulges that the criminal actions took place in Miami and that Ball and Pheterson altered the documents together. Further, Ball stated in his affidavit that neither he nor Pheterson informed Bell that they had altered the documents. (Appendix B, ¶ 28).

Bell filed a motion for a new trial based upon newly discovered evidence pursuant to Rule 33 of the Federal Rules of Criminal Procedure. That motion was denied in a memorandum opinion written by Judge Charles P. Kocoras of the United States District Court for the Northern District of Illinois. (Appendix C). The court of appeals affirmed the district court's opinion. (Appendix A). Bell's Petition for Rehearing was denied.

ARGUMENT

A NEW TRIAL SHOULD BE GRANTED BASED UPON A FINDING OF NEWLY DISCOVERED EVIDENCE.

Petitioner obtained a post-trial affidavit executed by co-defendant Michael Ball which sets forth an outline of

statements to which he would testify under oath at a new trial. (Appendix B).

In United States v. Feldman, 756 F.2d 556 (7th Cir. 1985), the court identified the criteria for a new trial on the basis of newly discovered evidence. The defendant must show that the evidence "(1) came to his or her knowledge only after trial; (2) could not have been discovered sooner had defendant exercised due diligence; (3) is material and not merely impeaching or cumulative; and (4) would probably lead to an acquittal in the event of a trial." Feldman, 765 F.2d at 560 (citation omitted).

The newly discovered evidence disclosed in Michael Ball's affidavit met each of the foregoing criteria, deflated the

Government's case against Bell, and requires that a new trial be granted.

1. The Evidence Came To Petitioner's Knowledge After The Trial, And, In the Exercise Of Due Diligence, Could Not Have Been Discovered Earlier By Petitioner.

Petitioner obtained the sworn affidavit of Michael Ball on August 27, 1986, after the court of apeals affirmed petitioner's conviction. On September 2, 1986, a motion for a new trial was filed based upon the statements set forth in that affidavit.

At trial Michael Ball entered a plea of not guilty, but asserting his rights under the Fifth Amendment, he chose not to and

could not have been compelled to testify at trial. It is clear that no admission of guilt by Michael Ball was available until after the trial and appellate proceedings were decided. Throughout the course of the criminal trial and on appeal, Ball maintained his innocence. It was not until after his conviction was affirmed that he admitted his criminal actions.

It is clear that petitioner could only have obtained the admissions set forth in Ball's affidavits after the trial. No amount of diligence could have forced Ball to alter his plea from not guilty to guilty or give testimony which would exonerate petitioner.

In a recent Illinois Supreme Court case, People v. Molstad, 101 Ill.2d 128, 461 N.E.2d 398 (1984), the court was confronted

with a motion for a new trial based upon the newly discovered post-trial testimony of co-defendants that defendant was not present when the crime was committed. The requirements for a new trial in Illinois are virtually identical to the requirements of Rule 33 of the Federal Rules of Criminal Procedure. 461 N.E.2d at 402. While Molstad, of course, is not binding on this Court, it is nevertheless instructive. The Court granted the motion for a new trial, recognizing that "no amount of diligence could have forced co-defendants to violate their fifth amendment right to avoid self-incrimination . . . if the co-defendant did not choose to do so." Id.

2. The Newly Discovered Evidence Materially Affects The Government's Case Against Against Deborah Bell.

Briefly, the affidavit of Michael Ball states that he, along with Irving Pheterson, prepared the fraudulent documents in Miami. (Appendix B, ¶ 10, 11, 12). Only superficial changes were made to documents in Chicago. (Appendix A, ¶17). Fraudulent documents were completed by Pheterson and Ball in Chicago at Attorney Tucker's office, but neither Bell nor Tucker were present at that time. (Appendix B, ¶20).

Ball never informed Bell of his plan to defraud the Bank. Moreover, Pheterson informed Ball that he had not informed Bell or Tucker of that plan. (Appendix B, ¶23). Pheterson told Ball that he represented to Bell and Tucker that the documents were

genuine. (Appendix B, ¶28).

The newly discovered evidence, if given full consideration would result in the acquittal of petitioner in the event of a new trial since the evidence against petitioner came from Irving Pheterson, a man whose statements are now contradicted by Ball and whose dubious credibility was acknowledged by the Seventh Circuit.

CONCLUSION

Petitioner Deborah Bell respectfully submits that this Court should grant this Petition, direct a Writ of Certiorari to the United of States Court of Appeals for the Seventh Circuit, reverse that court's decision affirming the district court's denial of petitioner's motion for new trial

and remand this cause for a new trial.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 87-1049, 87-1050, and 87-1324

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT L. TUCKER and DEBORAH BELL,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82 CR 253—**Charles P. Kocoras**, *Judge.*

ARGUED SEPTEMBER 18, 1987—DECIDED JANUARY 6, 1988

Before BAUER, *Chief Judge*, CUMMINGS, and POSNER, *Circuit Judges.*

BAUER, *Chief Judge.* A jury convicted Deborah Bell, Robert Tucker, and Michael Ball on charges of wire fraud, 18 U.S.C. § 1343, and submitting false statements to a federally insured bank, 18 U.S.C. § 1014. All were sentenced to prison terms plus periods of probation and ordered to make restitution, subject to certain conditions. In an earlier opinion, we affirmed the convictions. *United States v. Tucker*, 773 F.2d 136 (7th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S. Ct. 3337 (*Bell*), and ___ U.S. ___, 106 S. Ct. 3338-39 (*Tucker*) (1986).

Shortly before they were to surrender to their designated institutions on September 9, 1986, Bell and Tucker

each filed motions pursuant to Federal Rule of Criminal Procedure 35 for a new trial based upon newly discovered evidence, and motions to stay their surrender dates. The newly discovered evidence is the putative testimony of Ball, the essentials of which are contained in an August 27, 1986 affidavit accompanying the motions for a new trial. In addition, on January 27, 1987, Tucker filed a motion pursuant to 28 U.S.C. § 2255 to vacate and set aside his judgment of conviction and sentence, alleging constitutional deprivations in the petit jury selection process. The district court denied Bell's and Tucker's motions and both now appeal.

I.

Bell, a commodities broker in Chicago, and Tucker, her lawyer, contracted to sell 6,000 tons of beans to Guatemala for $5 million. Ball, a Miami freight forwarder, helped set up the deal. To get the beans, Bell contacted Irving Pheterson, a Miami commodities broker with a Far Eastern bean supplier. The contract provided that Guatemala would pay for the beans through a letter of credit issued by a Guatemalan bank and confirmed by the Continental Illinois National Bank in Chicago. Pursuant to the letter of credit, the Continental Bank would pay Bell for the beans upon receipt of documents showing that the beans had been loaded in Hong Kong on board a ship bound for Guatemala. Bell would then reimburse Pheterson.

The defendants presented to the Continental Bank documents showing that the beans had been loaded and shipped, and the bank paid on the letter of credit. There was no boat, however, and there were no beans. The documents were forged. The question at trial: By whom? The defendants argued that Pheterson designed the fraud and testified against them to save his skin. The government charged that because the letter of credit was not transferable, the defendants could not use it as collateral for a loan and therefore turned to forgery to get money to buy the beans. The jury found the government's version of events more credible and convicted all three defendants.

II.

Bell and Tucker both argue that the district court erred in denying them a new trial based upon the putative testimony contained in Ball's affidavit. That affidavit, in a nutshell, states that Ball and Pheterson prepared the false documents the defendants presented to the Continental Bank, and that neither Ball nor Pheterson told the defendants the documents were false before the bank paid on the letter of credit. Bell and Tucker argue that Ball's affidavit destroys Pheterson's trial testimony and vindicates their own version of events—that they had no knowledge of Pheterson's and Ball's fraudulent scheme.

Initially, we note that

> [t]he party who claims that the trial court erred in denying his motion for a new trial is not likely to be successful. The appellate court properly defers to the view of the trial court and will affirm unless there has been error as a matter of law or a clear and manifest abuse of judicial discretion.

United States v. Davis, 604 F.2d 474, 483 (7th Cir. 1979) (citation omitted). This is because a motion for a new trial based upon newly discovered evidence that exists only because a convicted defendant comes forward with an affidavit in which he states that he is prepared to exculpate his codefendants is inherently suspect. *United States v. Simmons*, 714 F.2d 29, 31 (5th Cir. 1983). Such motions are not favored by the courts and are viewed with great caution. *United States v. Goodwin*, 770 F.2d 631, 639 (7th Cir. 1985) (citation omitted), *cert. denied*, 474 U.S. 1084 (1986).

To obtain a new trial based upon newly discovered evidence, a defendant must show that the evidence " '(1) came to his or her knowledge only after trial; (2) could not have been discovered sooner had the defendant exercised due diligence; (3) is material, and not merely impeaching or cumulative; and (4) would probably lead to an acquittal in the event of a trial.' " *United States v. Feldman*, 756 F.2d 556, 560 (7th Cir. 1985) (quoting *United States v. Cherek*, 734 F.2d 1248 (7th Cir. 1984)).

The district court held that the putative testimony of Ball failed to satisfy the third and fourth prongs of the *Feldman* standard. The court found that Ball could not testify to some of the matters asserted in his affidavit under the Federal Rules of Evidence, that other assertions contained in it are consistent with the government's evidence, and that substantial evidence contradicts much of what Ball asserts that is inconsistent with the government's evidence. The court thus held that "[Ball's] proffered testimony is not new as to subject matter, but is a different version of what the jury heard. As such, and given its source, the evidence is merely impeaching or cumulative and is not material." The district court also found Ball's affidavit incredible. The court noted that Ball had "sat on his hands for close to four years" before coming forward with the new information, and that Ball had managed to accumulate another federal conviction for forging false documents in a sugar-for-export scheme between his felony conviction in this case and the date of his affidavit. The court concluded that "[c]onsidering the evidence against Ball himself and the fact that the jury convicted him on all counts, it cannot be said his testimony would probably lead to an acquittal in the event of retrial."

After reviewing Ball's affidavit and considering the defendants' contentions, we find that the district court did not abuse its discretion by refusing to grant a new trial. A district court, when entertaining a motion for a new trial, may rely on knowledge gained while presiding over the trial, *United States v. Garrison*, 296 F.2d 461, 465 (7th Cir. 1961), *cert. denied*, 369 U.S. 804 (1962), and when newly discovered evidence is suspect, it may assume the role of factfinder, *United States v. Carlin*, 573 F. Supp. 44, 46 (N.D. Ga. 1983) *affirmed*, 734 F.2d 1480 (11th Cir. 1984). Moreover, although Pheterson's testimony was important to the government's case against Bell and, especially, Tucker, *see Tucker*, 773 F.2d at 139, the government did not ground its prosecution entirely on Pheterson's story. Other corroborating evidence contributed to the

defendants' convictions. In Bell's case, there was fingerprint and handwriting evidence, testimony from bean suppliers, and testimony from Tucker's secretary. In Tucker's case, *inter alia*, his secretary testified to his presence during the preparation of questionable documents and to statements made by him that are consistent with guilty knowledge. *Id.* This corroborating evidence, plus the district court's understandable skepticism toward Ball's putative testimony, convinces us that the court did not abuse its discretion in denying a new trial.

III.

Tucker, who is black, also contends on appeal that the district court erred in denying his section 2255 motion to vacate and set aside his judgment of conviction and sentence. He argues that the court's finding that the prosecution did not purposefully exclude black venirepersons from the jury because of their race was clearly erroneous. He also argues that the procedure adopted by the district court to scrutinize the prosecution's motives violated his constitutional rights.

A.

During jury selection, before any party exercised any peremptory challenges, Tucker noted that only four of the thirty-six venirepersons questioned in the jury box were black. Tucker requested that the court require the prosecution to state, in camera for the record, its reasons for excusing any of the four blacks. The court reserved decision on the request.

The prosecution then exercised four of its seven peremptory challenges to exclude all four blacks on the venire. Tucker thereafter renewed his request that the court require the prosecution to explain in camera why it excused the blacks. After the prosecution told the court that it had reasons other than race for exercising its peremptories, the court asked if it would state those reasons in camera, out of the presence of the defendants. All the

defendants objected to an ex parte procedure. The court, however, overruled the defendants' objections.

After checking with its superiors, the prosecution agreed to comply with the court's request. Thus, in camera and out of the presence of the defendants, the prosecution explained that because the case involved a complicated international banking transaction between numerous parties with many complicated documents, it wanted jurors with education and business experience. After considering the government's explanation, the court "concluded and was satisfied that racial bias was not responsible for the challenge of the black venirepersons" without revealing the prosecution's stated reasons for the peremptories to the defendants.

B.

The Constitution's equal protection clause forbids a prosecutor from purposefully exercising peremptory challenges to exclude potential jurors solely on account of their race. *Batson v. Kentucky*, ___ U.S. ___, 106 S. Ct. 1712, 1718-19 (1986). In *Batson*, the Supreme Court held that a defendant may establish a prima facie case of such purposeful discrimination solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. *Id.* at 1722-23.[1] Once the defendant establishes a prima facie case of such purposeful exclusion, the

[1] To establish such a prima facie case, a defendant

> first must show that he is a member of a cognizable racial group, and that the prosecutor exercised peremptory challenges to remove from the venire members of his race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show . . . circumstances that raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Batson, 106 S. Ct. at 1723 (citations omitted).

burden shifts to the prosecutor to present a neutral explanation for challenging black jurors. *Id.*[2] The Court expressly declined, however, "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenge." *Id.* at 1724.

Batson thus enables a defendant to overcome the long-standing presumption announced in *Swain v. Alabama*, 380 U.S. 202 (1965), that "in any particular case . . . the prosecutor is using the state's challenges to obtain a fair and impartial jury." *Id.* at 222. Until the Court overruled that portion of *Swain* in *Batson*, a defendant seeking to raise an equal protection challenge had to show that a prosecutor systematically used, over some period of time, peremptory challenges to exclude blacks from juries. *See id.* at 227. Although *Swain* was still good law at the time of Tucker's trial, the Court in *Griffith v. Kentucky*, ___ U.S. ___, 107 S. Ct. 708, 716 (1987), held *Batson* retroactively applicable to all cases not yet final. We must, therefore, apply *Batson*'s holding to Tucker's claim.

C.

Tucker's most serious contention is that the district court's in camera, ex parte procedure violated his fifth amendment right to due process and his sixth amendment right to a fair and impartial jury. The parties do not dispute that Tucker made out a prima facie case of purposeful discrimination under *Batson*, and that the burden shifted to the government to articulate race-neutral reasons for its peremptory challenges. What is in dispute is whether *Batson* allows a court to hear the prosecution's reasons for excusing black venirepersons in camera and out of the

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[2] The prosecutor may not rely on an assumption that the challenged jurors would be partial to the defendant because of their shared race; nor may the prosecutor merely deny any discriminatory motive or assert good faith. *Batson*, 106 S.Ct. at 1722-23. The prosecutor "must articulate a neutral explanation related to the particular case to be tried." *Id.*

presence of the defendants, and then rule on the *Batson* challenge without divulging those reasons to the defendants. Tucker argues that "a secret proceeding between the prosecutor and the court" is an irrational interpretation of *Batson*, and that nothing in *Batson* or its progeny suggests that a prosecutor can rebut a defendant's prima facie case through an ex parte conversation with the judge. The government responds that *Batson* does not require an adversarial hearing before a court can rule on a *Batson* challenge and points to the Sixth Circuit's recent decision in *United States v. Davis*, 809 F.2d 1194 (6th Cir.), *cert. denied*, ___ U.S. ___, 107 S. Ct. 3234 (1987), for support.

In *Davis*, during jury selection in a pre-*Batson* trial, black defendants objected when the prosecution exercised peremptory challenges to exclude seven of nine black venirepersons from the petit jury. After finding facts sufficient to establish what it determined was a prima facie case of racially motivated exclusion, the district court required the prosecution to state its reasons for the peremptories in camera and out of the presence of the defendants. *Id.* at 1200. The district court then found that the prosecution did not purposefully exclude the venirepersons on the basis of their race. *Id.* On appeal, the Sixth Circuit held that the in camera, ex parte procedure was constitutional because "the record of the proceedings . . . simply [did] not indicate a situation where the presence of the defendants and their counsel was required to ensure fundamental fairness." *Id.* at 1201. The Sixth Circuit noted that the trial court had predicted with remarkable accuracy the burdens of proof and persuasion later pronounced by the Supreme Court in *Batson*, and found that the trial court's procedure was consistent with that decision because

> *Batson* does not require rebuttal of the Government's explanation by defense counsel. Nor does *Batson* require the participation of defense counsel while the Government's explanations are being proferred. This is not to say that rebuttal and participation by a defendant in the "neutral explanation" phase of a *Batson* challenge are always inappropriate. To the con-

> trary, the Supreme Court left it up to the trial court to determine what role defendants were to play once the government proffered its reasons for black juror exclusion.

Id. at 1202. In short, "the district court was entitled to hear from the government under whatever circumstances the court felt appropriate." *Id.*

The Ninth Circuit disagrees. A divided panel of that court held recently that the Constitution requires adversarial hearings when defendants raise *Batson*-type challenges. *United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987). In *Thompson*, the prosecution, during a pre-*Batson* trial, used peremptory challenges to exclude all four black venirepersons from the petit jury. After the defendant moved for a mistrial, the district court heard the prosecution's reasons for the disputed challenges in camera and out of the presence of the defendant, who argued that such a procedure violated his fifth and sixth amendment rights.

The Ninth Circuit, in its comprehensive treatment of the issue, first noted that

> situations where the court acts with the benefit of only one side's presentation are uneasy compromises with some overriding necessity, such as the need to act quickly or to keep sensitive information from the opposing party. Absent such compelling justification, ex parte proceedings are anathema in our system of justice and, in the context of a criminal trial, may amount to denial of due process.

Id. at 1258-59. The court then considered three "separate, but related" justifications for the ex parte procedure asserted by the government: (1) that once a defendant has identified a potential *Batson* violation, its participation is no longer necessary for the district court to make its determination; (2) that adversarial hearings potentially involving the questioning of government counsel would be too burdensome and disruptive; and (3) that the potential for release of confidential information could prejudice

the government's ability to prosecute its case. *Id.* at 1259-61.

The Ninth Circuit found the first justification the least persuasive. According to the court, the defendant can point out to the judge when the government's stated reason may indicate bad faith, and may be able to argue that the government's reasons are legally improper. Thus, the notion that a defendant has nothing to add once he or she has identified a potential *Batson* violation "did not square with reality." *Id.* at 1260.[3] The court also rejected the second justification, stating that it "would be surprised . . . if [adversarial] proceedings [would] involve anything more elaborate than the prosecutor's articulation of his reasons, followed by the argument of defense counsel pointing out why the articulated reasons are factually unfounded or legally insufficient." *Id.* at 1259-1260. The government's third justification, however, had some merit. "It is certainly possible," the court admitted, "that in a particular case the prosecution's motive for excluding potential jurors will grow out of its case strategy, and divulging those reasons to opposing counsel could cause it severe prejudice." *Id.* at 1259. But the court also dis-

[3] The Ninth Circuit believed that this justification "carried the day" with the Sixth Circuit in *Davis*. *Thompson*, 827 F.2d at 1260. We think this misreads the *Davis* opinion. The Sixth Circuit in that case found that the record of the proceedings *in the case before it* did not indicate a situation where the presence of the defendant was required to ensure fundamental fairness. See *Davis*, 809 F.2d at 1201. In addition, the Sixth Circuit amplified that it was referring only to the case before it when it explained its view of the proceeding below. It noted that the defendants had been able to argue the constitutional issue when it made each of three objections to the government's peremptory challenges during the jury selection process, and that the district court gave the defendants' claim painstaking attention by constructing a procedure for determining whether there was a racial motivation for the government's actions. *Id.* Moreover, the Sixth Circuit made clear that it was not holding that rebuttal by defendants in the explanation phase of a *Batson* challenge is always inappropriate. *Id.* at 1202.

carded this justification, reasoning that "when a prosecutor claims that his reasons relate to case strategy, the district judge can consider those reasons on an ex parte basis, at least initially, much as in situations involving *Brady* materials or the identity of informants." *Id.*

We disagree with the Ninth Circuit's holding that *Batson* requires adversarial hearings once a defendant establishes a prima facie case of purposeful discrimination. As already noted, the Supreme Court in *Batson* expressly declined to formulate procedures for district courts to follow upon a defendant's objection to a prosecutor's challenges. *Batson*, 106 S. Ct. at 1724. The Court apparently did so because trial judges deserve and normally enjoy a wide range of discretion in the administration of trials.[4] Indeed, the Ninth Circuit in *Thompson* stressed the central importance of trial court discretion in our criminal justice system. *See Thompson*, 827 F.2d at 1257-58. And that court's allowance for in camera, ex parte hearings when the prosecution claims that it exercised peremptory challenges pursuant to its case strategy gives the trial court discretion to determine whether an adversarial hearing is required in many, if not most cases. Stated bluntly, the *Thompson* exception swallows the *Thompson* rule. As Chief Judge Sneed's dissent pointed out, the majority in *Thompson* resorted to trial court discretion "to rescue it from the most troublesome aspect of its opinion." *Id.* at 1262 (Sneed, C.J., dissenting).

We thus agree with the Sixth Circuit that *Batson* neither requires rebuttal of the government's reasons by the defense, nor does it forbid a district court to hold an adversarial hearing. In this case, then, the district court's procedure passed constitutional muster. Indeed, we think the district court handled Tucker's challenge remarkably

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[4] In the *Batson* Court's view, there was no reason to assume that trial judges would not identify prima facie cases of purposeful discrimination and perform conscientiously their duties under the Constitution. See *Batson*, 106 S. Ct. at 1724 n.32.

well. Like the district court in *Davis*, the court below accurately anticipated the burdens of proof and persuasion set forth in *Batson*, and its procedure certainly was countenanced by that decision.

Despite this conclusion, we believe that adversarial hearings are the appropriate method for handling most *Batson*-type disputes. In this case, for example, we believe that the prosecution could have explained its reasons for excluding the four black venirepersons in open court. Thus, while we hold that it is up to the trial judge to decide what procedure is best-suited for a particular case, we trust that the trial judge will utilize an adversarial procedure whenever possible.

D.

We have already considered and decided Tucker's final assertion—that the district court erred in finding that the prosecution did not purposefully exclude blacks from the jury because of their race. In the direct appeal of the defendants' convictions, we found that the judge had "satisfied himself that racial bias had not been responsible for the exclusion of the blacks. His determination, although challenged by the defendants, was not clearly erroneous, and therefore binds us." 773 F.2d at 142. It binds us still.

The district court is therefore

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. 82 CR 253
v.	)	Honorable Charles Kocoras
DEBORAH BELL,	)	
Defendant.	)	

NOTICE OF MOTION

TO: Daniel Murray
United States Attorney
219 S. Dearborn St., Rm. 1500
Chicago, IL 60604

PLEASE TAKE NOTICE that on the 3rd day of September, 1986, at 9:30 a.m. or as soon thereafter as counsel may be heard, I shall appear before the Honorable Charles Kocoras, Room 1614, 219 South Dearborn Street, Chicago, IL, and then and there present the defendant's Motion for New Trial and Motion to Stay Surrender Date, true and correct

copies of which are attached hereto and hereby served upon you.

Dated: August 28, 1986

John A. Dienner, III
One of the Attorneys for
Defendant, Deborah Bell

Matthias A. Lydon
John A. Dienner, III
Pierce, Lydon, Griffin & Montana
A Professional Corporation
100 West Monroe Street
18th Floor
Chicago, Illinois 60603
(312) 346-9538

PROOF OF SERVICE

I, Steve C. Silvey, a non-attorney on oath state that I have served the foregoing Notice of Motion, Motion for New Trial and Motion to Stay Surrender Date, upon:

Daniel Murray
United States Attorney
219 S. Dearborn St., Rm. 1500
Chicago, Illinois 60604

by personally delivery, this 28th day of August, 1986.

_____

Subscribed and Sworn to before me
this 28th day of August, 1986.

_____
Notary Public

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. 82 CR 253
v.	)	Honorable Charles Kocoras
DEBORAH BELL,	)	
Defendant.	)	

MOTION FOR NEW TRIAL

Comes now the defendant, Deborah Bell, by her attorneys, Matthias A. Lydon, John A. Dienner, III and Pierce, Lydon, Griffin & Montana, A Professional Corporation, who moves this Court for a new trial based upon newly discovered evidence. In support of said motion this defendant states as follows:

1. Before, during and after the trial in the above-captioned case, a co-defendant

of the movant (Michael Ball) had personal knowledge of facts which, if revealed at trial, create a strong likelihood that the defendants would have been found not guilty of the charges.

2. This evidence was not shared with the movant, at the direction of Ball's trial attorney.

3. On August 27, 1986 movant's counsel met with Michael Ball, took his statement, and prepared an Affidavit for his signature. That Affidavit is attached hereto as Exhibit A.

4. The facts set forth in the Ball Affidavit establish that movant did not knowingly present false or forged documents to the Continental Bank as is charged in the indictment.

WHEREFORE, the movant urges this Court to set this matter down for a hearing on her motion for a new trial.

Respectfully submitted,

_____
John A. Dienner, III

Matthias A. Lydon
John A. Dienner, III
Pierce, Lydon, Griffin & Montana
A Professional Corporation
100 West Monroe Street
Eighteenth Floor
Chicago, Illinois 60603
312/346-9538

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. 82 CR 253
v.	)	Honorable Charles Kocoras
DEBORAH BELL,	)	
Defendant.	)	

MOTION TO STAY SURRENDER DATE

Comes now the defendant, Deborah Bell, by her attorneys, Matthias A. Lydon, John A. Dienner, III and Pierce, Lydon, Griffin & Montana, A Professional Corporation, who moves this Court to stay her surrender date which is currently set for September 9, 1986. In support of said Motion this defendant states as follows:

1. This defendant has pending before this Court an unresolved motion for a new

trial based upon newly discovered evidence.

2. Movant needs to be present in order to assist her attorneys with the preparation for the hearing on that motion for a new trial.

WHEREFORE, the movant urges this Court to stay her surrender date until sometime after the hearing on her motion for a new trial.

Respectfully submitted,

_____

John A. Dienner, III

Mattias A. Lydon
John A. Dienner, III
Pierce, Lydon, Griffin & Montana
A Professional Corporation
100 West Monroe Street
Eighteenth Floor
Chicago, Illinois 60603
312/345-9538

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

Comes now Michael Ball who having been duly sworn states as follows:

1. I am Michael Ball and I presently reside at 291 N.W. 106th Avenue, Plantation, Florida, 33324.

2. I was one of the defendants in the case of the United States of America v. Robert Tucker, et al., 83 CR 2563. My case was tried together with defendants' Robert Tucker and Deborah Bell.

3. I give this Affidavit of my own free will and with the knowledge and consent of my attorney.

4. Deborah Bell has agreed to reimburse me for my expenses from Florida to

Chicago so that I could meet with her attorney and sign this Affidavit.

5. The facts set forth herein are personally known to me and I could testify to them if called as a witness in this matter.

6. In 1980 I was self-employed as a freight forwarder doing business as Inter-American Express, Inc. and M & B Forwarding, Inc., 1840 West 49th Street, Hialeah, Florida.

7. At some time in late August, 1980, I was approached by Irving Pheterson who was doing business as International Association of Grocers, Inc. out of Hallandale, Florida.

8. Pheterson had been introduced to me in May or June, 1980. I knew him to be engaged in the business of home food

delivery service and acting as an international commodity trader. He knew me to be involved in the business of international freight forwarding. He stated that he had a commodity sale for which he needed shipping assistance. He stated that the purchaser was the Government of Guatemala.

9. I explained to Pheterson that he would be unable to participate in the sale of the beans unless he had $6 million to support a back to back letter of credit, because the letter of credit from Guatamala would be non-transferable, based on my experience (which turned out to be the case). I explained to Pheterson that if non-conforming documents were presented to the local Bank (Continental), it would

assist Bell (the beneficiary under the letter of credit) in requesting that amendments be made to the letter of credit, due to what could be extenuating circumstances - i.e., the shipment could not be made with the letter's current conditions and delay in the receipt of the beans would cause Guatemala, which had a pressing need for the product, to suffer. The most important amendment would be to make the letter of credit transferable. This change would allow Pheterson to participate in the deal; otherwise he would be excluded.

10. I helped to prepare the following documents: a Peruvian Amazon Line Bill of Lading, a Certificate of Origin, Quality Certificate, Phytosanitary Certificate and Insurance Certificate.

11. Pheterson prepared, in my personal presence, an Agreement (what became known as the "August 15, 1980 Agreement") and a Product Sale and Purchase Agreement. Said documents were typed in my freight forwarding office on my IBM Selectric typewriter, which typewriter is still in my possession.

12. At Pheterson's request and with his knowledge, certain of the documents described in paragraph 10 above, were affixed with counterfeit counsular seals and the forged signatures of the Guatemalan counsel in Miami, Florida - Mr. Aragon. Said counterfeit seals and forged signatures were not prepared by me.

13. All of the above recited events (paragraphs 7 through 12) were accomplished

in Florida without the knowledge, consent or participation of Deborah Bell or Robert Tucker.

14. Pheterson told me that he was going to deliver the above referenced documents to Bell for her presentation to Continental Bank.

15. Pheterson came to Chicago, Illinois on September 3, 1980 but brought with him only certain taxes which purported to show that he had a supplier for the beans.

16. I came to Chicago, Illinois on September 4, 1980 and brought with me the documents which Pheterson and I knew to be rejected. Pheterson told me in November, 1980 that he had not told Bell that the documents wereintentionally non-conforming but rather provided them to Bell and Tucker

as if they were genuine documents for the shipment of beans.

17. The only documents prepared in Chicago at Tucker's office were the retyped "August 15 1980 Agreement," the Certificate or Origin, Weight Certificate and Product Sale and Purchase Agreement. Certain minor facial changes were made in Tucker's office to the non-conforming documents which I carried to Chicago from Florida.

18. After the documents were presented to the Bank certain of them were returned to Bell with the explanation that there were dsicrepancies between the letter of credit and the documents. I was later informed that one such document, the Phytosanitary Certificate was presented to the Bank on Monday, September 8, 1980 unchanged in form. Another document, the Bill of Lading

was rejected for lacking the signature of the Guatamalan consul, Mr. Aragon. The Certificate of Origin was rejected as it lacked the consular seal.

19. I was with Pheterson the evening of August 4, 1980 in his hotel room. He stated to me that he no longer cared about the ultimate outcome of the transaction and that all he wanted was to get his $198,000 commission and that he would then give his supplier's name to Bell. Pheterson stated that he was very unhappy with Bell because she had shown him a lack of professional courtesy and personal respect.

20. Pheterson had in his possession on Friday, September 4, 1980, a pre-signed Bill of Lading form which was not filled in. Pheterson had Tucker's secretary fill in this pre-sealed form based on the information on the original Bill of Lading which

had been submitted to the Bank. (Tucker had made his secretary available to Pheterson earlier that day). Pheterson also had in his possession on Friday, September 5, 1980 a pre-sealed Certificate of Origin which was not filed in. Pheterson similarly had the sealed certificate filled in based on the information from the original certificate. Neither Bell nor Tucker were in the office when this was done.

21. Pheterson tendered the new Bill of Lading and Certificate of Origin to Bell and Tucker on Monday, September 8, 1980.

22. The new Bill of Lading, Certificate of Origin and the original Phytosanitary Certificate were presented to Continental Bank on Monday, September 8, 1980.

23. At no time prior to the Bank's

paying out on the letter of credit did I tell or have reason to tell Bell that it was Pheterson and my plan to purposely present non-conforming documents to the Bank. In November, 1980 Pheterson told me that he had not advised Bell or Tucker of that plan.

24. After the letter of credit was drawn down, Bell and Tucker became suspicious that Pheterson's supplier could not or would not deliver the beans.

25. Thereafter, Tucker and Bell travelled to Hong Kong, to try to locate and confirm the existence of a supplier. I was present and acting as Pheterson's shipping agent although I had not arranged any shipping and no beans were loaded on board as the shipping documents represented.

26. While Bell and Tucker were in Hong Kong they met Pheterson's supplier and that

supplier told tham that no beans were committed to them much less loaded on board ship because Pheterson had failed to act within the supplier's time deadline.

27. Bell and Tucker made their own purchase and sale agreement with the supplier and arranged a letter of credit for the purchase of the beans.

28. Pheterson told me in early November, 1980 that he never told Bell or Tucker that the documents were intentionally non-conforming but rather that the documents had been changed to appear to be genuine, conforming documents and that he represented them to be geniune documents to Bell and Tucker.

29. I have personal knowledge with regard to the details concerning the preparation, in Florida, of the document

forms themselves and could testify to those facts and could testify in greater detail to the facts set forth above.

MICHAEL BALL

SUBSCRIBED AND SWORN to
before me this 27th day
of August, 1986.

NOTARY PUBLIC

Julianne P. Joyce, Notary Public
Cook County, Illinois
My Commission Expries Nov. 8, 1989

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. 82 CR 253
v.	)	Honorable Charles Kocoras
DEBORAH BELL,	)	
Defendant.	)	

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

On April 7, 1982, Deborah Bell, Robert L. Tucker and Michael Ball were charged in a ten count indictment with violations of the wire fraud statute and with presenting false documents to a federally insured bank. In substance, the indictment charged the defendants with having engaged in a scheme to

obtain over $5 million from Continental Illinois National Bank & Trust Company of Chicago by presenting false and fraudulent documents to Continental in order to obtain payment on a letter of credit. The documents falsely represented, among other things, that 6,600 metric tons of black beans were loaded on board a ship in the far east for ultimate destination to Guatemala. The payment was made by Continental on the basis of the false documents, although there was, in fact, no ship, no loading and no beans.

The evidence at trial supported the government's charges and all defendants were found guilty of all charges. The scheme was concocted and executed in the summer and fall of 1980; the trial was conducted from

December 6, 1982 to January 12, 1983. None of the defendants testified at trial. On February 24, 1983, the defendant Deborah Bell was sentenced to 2 years incarceration and 5 years probation, the defendant Robert Tucker to 15 months incarceration and 5 years probation, and Michael Ball to 9 months incarceration and 5 years probation. The convictions of all three defendants were affirmed by the Seventh Circuit Court of Appeals on September 6, 1985.

Surrender dates were set for all three defendants for September 9, 1986. On September 3, 1986, the defendants Bell and Tucker filed motions for a new trial based upon newly discovered evidence. The newly discovered evidence is the putative testimony of co-defendant Michael Ball, the

essentials of which are contained in his affidavit accompanying the motions for a new trial.

Federal Rule of Criminal Procedure 33 provides for a new trial on the basis of newly discovered evidence. Before a new trial will be granted, however, defendants must show all of the following:

> 1. The evidence came to their knowledge only after trial;
>
> 2. could not have been discovered sooner had defendants exercised due diligence;
>
> 3. is material, and not merely impeaching or cumulative; and
>
> 4. would probably lead to an acquittal in the event of a retrial.

United States v. Robinson, 585 F.2d 274, 277 n.4 (7th Cir. 1978) (en banc).

Ball's affidavit is silent as to why he

did not testify at trial in a manner consistent with his affidavit and why he did not come forward at any time in the 3 1/2 years between the trial and the execution of his affidavit on August 27, 1986. Ball does not admit his own guilt in the affidavit and the inference to be drawn from hi averments is that he did not act with fraudulent intent in any of the actions he ascribes to himself.[1]

Joe Dienner, one of Deborah Bell's trial counsel and the attorney who filed her instant motion, supplied his own affidavit

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[1]Ball says that he came to Chicago knowing that non-conforming documents were going to be presented to the bank with the expectation that they would be rejected. Ball says that if the documents were rejected, it would assist Deborah Bell in requesting that amendments be made to the letter of credit. Not only did the evidence (footnote continued on next page).

in his reply to the government's answer to the motion for a new trial. In it, Dienner states that from the conclusion of the trial until August, 1986, Deborah Bell told Dienner that she was in periodic contact with Michael Ball, that Ball told her he had information that would exonerate her, but that he was unwilling to provide it for fear of implicating others who were not indicted and whose identity had not been revealed in the government investigation or at trial. Assuming accuracy in the transmission of

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(continued from previous page).
at trial suggest that this contention is preposterous, it also highlights the question of why this testimony was not offered at a joint or separate trial, either on behalf of Ball himself or on behalf of any co-defendant. Ball is suggesting that he did not act with fraudulent intent. As such, it is exculpatory of him as well as his co-defendants.

Ball's statements (multiple, hearsay considerations being ignored), Ball's essential position, if believed, is that he sacrificed the innocent so that the guilty may go free.

Ball's present position is an interesting one, since the only person to whom he imputes criminality in his affidavit is Irving Pheterson, Aside from describing his own acts and attempting to exculpate Bell and Tucker, nobody except Pheterson is mentioned in Ball's affidavit. A trial court can view with some skepticism a motion for a new trial based on newly discovered evidence which exists only because a convicted defendant comes forward later with an affidavit in which he states that he is now prepared to exculpate his co-defendant.

Such a claim is inherently suspect. United States v. Simmons, 714 F.2d 29, 31 (5th Cir. 1983).

Neither Deborah Bell nor Robert Tucker moved for a severance from Michael Ball in order to call him as a witness at their trial. And although there are conflicting affidavits as to the availability of Ball for interview or use as a witness at trial,[2] it is clear that Ball was interviewed prior to trial by Deborah Bell's lead trial

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[2]Marshall Weinberg, Ball's attorney, supplied an affidavit to the effect that Ball was not directed not to discuss the facts of the case with his co-defendants and that Weinberg was never asked by either Ball, Tucker, or any of their counsel as to Ball's availability to testify at trial. Raymond Smith, one of Tucker's attorneys, supplied an affidavit to the effect that Weinberg denied Smith's request to interview Ball or relay to Smith the results of Weinberg's interview of Ball. Smith does (footnote continued on next page).

counsel, Matthias Lydon. In his affidavit, Lydon says he interviewed Ball at Ball's home in Miami, Florida. Lydon says Ball vaguely and generally blamed Pheterson for his situation and provided no information of worth to Deborah Bell's defense. Although Lydon does not tell us the specifics of what Ball said, Lydon concluded that none of the information was exculpatory (Lydon says he interviewed Ball at Ball's home in Miami, Florida. Lydon says Ball vaguely and generally blamed Pheterson for his situation

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(continued from previous page)
say, however, that Weinberg told Smith that Weinberg offered to plead Ball guilty in plea negotiations with the government which would have included a provision that Ball testify for the government; the plea discussions fell through. Smith also said that Weinberg said Ball would not be testifying for either side or for himself because he was concerned about forgeries that the evidence indicated Ball had made.

and provided no information of worth to Deborah Bell's defense. Although Lydon does not tell us the specifics of what Ball said, Lydon concluded that none of the information was exculpatory (Lydon says "of worth") of Bell, even though Ball was asked, presumably, to supply any exculpatory information he may have possessed.[3]

Ball had the opportunity to supply exculpatory information on Bell and Tucker on prior occasions, but did not do so. And if Smith's affidavit is accurate, Ball once considered testifying for the government and against his co-defendants. That didn't

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[3]Smith's affidavit states that Lydon told him he had attempted to interview Ball, but was unsuccessful. Smith's affidavit is clearly incorrect as to this point, since Lydon did interview Ball and came away from the interview with nothing that could help his client, Deborah Bell.

happen either. Additionally, he chose not to testify on his own behalf. The language of United States v. Rocco, 587 F.2d 144, 148, (3rd Cir. 1978), is particularly instructive here:

> Any rule of law which would result automatically in a new trial upon the submission of an affidavit like the one in this case would place tremendous and dangerous power in the hands of a pleading co-defendant. It would enable him to give to a co-defendant who chooses to go to trial the gift of a second chance if the first jury should convict, and this where there is substantial doubt as to whether the witness's testimony was even desired at the time of the original trial and thus substantial doubt as to whether that now-proffered exculpatory testimony is worthy of belief.

Although Ball was not a pleading co-defendant as the case in Rocco, if Ball was interested and desirous of adding his testimonial voice to those of other

witnesses in this case, he could have said so at the time and explored the possibility of a severance with his own counsel. Although possessed of the opportunity to do so, Ball gave no hint that he could help Bell or Tucker. It is small wonder that the law recognizes such late volunteers as inherently suspect.

For Michael Ball to have sat on his hands for close to four years before he came forward to offer exculpatory testimony is to render that evidence suspect in and of itself. His present version is rendered even more implausible when it is apparent that he not only had the opportunity to come forward earlier, but was beseeched to do so. All of the indications are that at the earlier time, he had no information helpful

to his co-defendants. And if Smith's affidavit is accurate, Ball even contemplated testifying against Bell and Tucker. Considering the evidence against Ball himself and the fact that the jury convicted him on all counts, it cannot be said his testimony would probably lead to an acquittal in the event of retrial.

In addition to the above considerations there is an additional reason why Michael Ball's present affidavit is untrustworthy. Between his felony conviction in this case and his affidavit of August, 1986, Ball has managed to accumulate another federal conviction in another federal court. On June 21, 1985, Michael Ball was indicted in the United States District Court in the Eastern District of Louisiana along with

eight other defendants in a case involving a sugar for export scheme. That case involved a host of phony bills of lading, along with other false documents, purporting to show shipment of sugar from the United States to various foreign ports and countries. There apparently were no such shipments. Ball was convicted for his acts in the sugar scheme on July 10, 1985 and was sentenced on August 28, 1985.

In addition to the nature of the sugar scheme when compared to the bean scheme in this case, it is also interesting to note that the criminal acts by Ball were done after his conviction and sentence in this case. Needless to say, Ball was not deterred from engaging in criminal conduct by virtue of his conviction and sentence in

this case. The fact of his later conviction and sentence in this case. The fact of his later conviction also interdicts the notion that he is a man presently worthy of belief.

Some of the matters asserted by Ball in his affidavit could not be testified to by virtue of the rules of evidence. Other of those assertions are consistent with the government's evidence, while some are not. There is substantial evidence which contradicts much of what Ball asserts, particularly as to his own knowledge and conduct. He acted in an effort to make the fraud scheme succeed, and the jury so found. His preferred testimony is not new as to the subject matter, but is a different version of what the jury heard. As such, and given its source, the evidence is merely

impeaching or cumulative and is not material. Consequently, that standard has not been satisfied by the moving defendants.

The defendants have failed to satisfy two of the four standards for a new trial previously set out. Because of that, it is unnecessary to consider the timeliness of their knowledge of the new evidence or the diligence with which they acted.

The essential facts in this case, as the jury found, are that Deborah Bell, Robert Tucker and Michael Ball engaged in a successful scheme to defraud certain victims of funds in excess of $5 million. They acquired those funds after presenting documents that they had acquired black beans which were on their way to the people of Guatemala for their consumption. There were

no beans, and when the defendants were finished with their manipulations, they were much richer and the people of Guatemala were much poorer. The defendants were fairly tried and convicted by a reasonable jury based on the evidence and were compassionately sentenced by this Court.

For the above reasons, the motions for a new trial are denied. Deborah Bell's renewed motion for a reduced sentence based on Ball's affidavit is also denied.

Charles P. Kocoras
United States District Judge

Dated: December 31, 1986